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No. 89-333

IN THE

Supreme Court of the United States

October Term, 1989

State of California,

Petitioner,

v.

Federal Energy Regulatory Commission, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE, AMERICAN PUBLIC POWER ASSOCIATION, IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus curiae, the American Public Power Association ("APPA"),[1] is a national service organization representing approximately 1,750 publicly-owned local electric utilities in 49 states, Puerto Rico, the Virgin Islands, Guam and American Samoa. APPA members include state agencies, cities, towns, and water storage and irrigation districts; nearly all of its members qualify as "municipalities" under section 3(7) of the Federal Power Act ("FPA"), 16 U.S.C. § 796(7). Many APPA members own and operate projects licensed by the Federal Energy Regulatory Commission ("FERC" or "Commission"); some are in the licensing or relicensing stages. Other members are dependent upon power production from FERC licensed projects.

[1] As required by the Court's Rule 36.1, written consent has been obtained from the parties to the filing of this brief amicus, and has been lodged with the Clerk.

If this Court were to accept the State of California's invitation to overrule *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), the ramifications on APPA's membership and the entire electric utility industry would be substantial. For over 40 years, the industry has conducted hydroelectric power operations and power resources planning activities in reliance on *First Iowa*'s determination that FERC is the ultimate regulatory authority over water power development affecting interstate commerce. To overrule that decision now would cause hydroelectric power operations to be subjected to 50 different state laws and to the idiosyncracies of each state's principles and criteria for using water.

SUMMARY OF ARGUMENT

There is no need for the Court to grant a writ in this case. There is no conflict in the opinions of this Court with the Court's opinion in the *First Iowa* case, found by the Ninth Circuit to be controlling here. Nor is there any conflict among the Circuits. Rather, there has been uniform recognition that Congress in the Federal Power Act established a Commission to avoid duplicative regulation of hydroelectric power production in order to achieve its substantial benefits. The petition should be denied.

ARGUMENT

In its opinion below, the Ninth Circuit held "that Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary [water] rights remains in state hands." *California ex rel. State Water Resources Board v. FERC*, 877 F.2d 743, 750 (9th Cir. 1989). The court agreed with FERC that the establishment of minimum bypass flows for hydroelectric projects is a regulatory matter within the Commission's comprehensive planning authority rather than one involving proprietary water rights under state law. In so ruling, the Court of Appeals was merely following a long and unswerving line of cases.

The issue raised by California is squarely controlled by this Court's 1946 decision in *First Iowa*. There, the Court rejected the argument that the Federal Power Act leaves the states with the power to regulate federally licensed projects. The Court held that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." 382 U.S. at 181 (footnote omitted). Section 27 of the FPA, 16 U.S.C. § 821, a "savings" provision which disclaims any intent to displace state water rights laws, was found to pertain only to proprietary water rights. *Id.* at 175-76.[2] The FPA does not give the states a veto power over licensed projects because "[s]uch a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." *Id.* at 164 (footnote omitted).[3] *See also id.* at 168 ("A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.... Conformity to both standards would be impossible in some cases and probably difficult in most of them.") (footnote omitted); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958) (calling the FPA a "detailed and comprehensive plan") (footnote omitted).

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[2] The present case does not involve rights to the use of water under state law, long known as "state water rights." While the present project does impact on state water laws, as would any river project, it does not affect any individual proprietary rights to water. Neither California nor any individual claims that the present hydroelectric project has adversely affected his/her claim to water. Thus, any attempt to turn this case into a water rights case under 27 must fail. This is an exercise by California to supercede FERC's duty to regulate licensed project water releases, in this case for fish.

[3] The dramatic change sought by California is clearly the exercise of a veto power. "Changing the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project." *California v. FERC*, 877 F.2d at 749.

First Iowa repeatedly has been relied upon not only by this Court but by other courts as well in cases involving the FPA and conflicting state regulation. *See Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445 (1955) ("To allow Oregon to veto such use [of a river for a power project], by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision."); *Pennsylvania Dept. of Envtl. Resources v. FERC*, 868 F.2d 591, 598 (3d Cir. 1989) (state laws relating to pollution, flood control, aesthetics and recreation, and natural resources conservation do not fall within section 27's savings provision); *Board of Elec. Light Comm'rs of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983) ("In *First Iowa* ..., the Supreme Court held that the detailed provisions of the Federal Power Act left no room for conflicting or duplicative state regulations."); *Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953) ("Consistent with the *First Iowa* case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States."); *Mega Renewables v. County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986) ("*First Iowa* clearly held that states (or in this case the county) may not impose permit requirements on federally licensed hydro-power projects."); *Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982) (collecting cases), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield, Vermont v. Vermont Envtl. Bd.*, 521 F. Supp. 243, 248-49 (D. Vt. 1981) (collecting cases). Other cases have relied upon *First Iowa* or cited it approvingly in a variety of situations. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983) (distinguishing *First Iowa* on the basis that the FPA is more comprehensive than the Atomic Energy Act); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 385 & n.4 (1963); *Georgia Power Co. v. Baker*, 830 F.2d 163, 165-66 (11th Cir. 1987); *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269, 275 (10th Cir.) *cert. denied*, 479 U.S. 829 (1986); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1085 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980); *California v. Oroville-Wyandotte Irrigation Dist.*, 411 F. Supp. 361, 367 (E.D. Cal. 1975), *aff'd*, 536 F.2d 304 (9th Cir.), *cert. denied*, 429 U.S. 922 (1976); *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 836 (S.D. Cal. 1958). Such persistent and uniform reliance on *First Iowa* belies California's contention that the pertinent part of *First Iowa* was mere dictum.[4]

California contends that *First Iowa* and all of the cases relying on it have been undercut by *California v. United States*, 438 U.S. 645 (1978), which interpreted section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383. Such a contention is flawed in two crucial respects.

First, there are fundamental differences between section 8 of the Reclamation Act and section 27 of the FPA.

> In *California v. United States*, the Supreme Court dealt with a statute distinct in both purpose and history from that at issue in *First Iowa*. *First Iowa* had examined federal preemption of the *licensing of hydroelectric projects*. . . . *California v. United States* explored state and federal *authority over federal reclamation projects* . . . . Notwithstanding some similarity in the wording of the statutes, they serve different objectives, and relate to federal actions dissimilar in nature.

Town of Springfield v. McCarren, 549 F. Supp. at 1154 (emphasis supplied). Because the two cases dealt with dissimilar subjects, their holdings are not inconsistent. There is, however, one commonality between the two cases: "If there is one theme that runs through both *First Iowa* and *California v. United States*, it is that duplicative regulation is to be avoided." *Id.* at 1156. This is exactly what the Ninth Circuit avoided by its opinion in the present case.

Second, decisions by this Court issued after *California v. United States*, continue to treat *First Iowa* as good law. In 1982, in

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[4] The long line of cases also belies California's contention that the preemption issue has been dormant and that with the increase in applications for FERC licenses since 1978, it has gained immediacy. Cert. Pet. 6 n.1. The cases show that the issue has not been dormant but rather has been conclusively and uniformly settled against conflicting state regulation.

New England Power, 455 U.S. at 338 n.6, the Court stated "New Hampshire's purported 'ownership' of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. *See First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946)." *See also Pacific Gas*, 461 U.S. at 223 n.34 (comparing and contrasting *First Iowa* and the FPA and FERC with the Atomic Energy Act and the Nuclear Regulatory Commission). Lower federal courts also have continued to treat *First Iowa* as good law following *California*. *See Pennsylvania Dept. of Envtl. Resources*, 868 F.2d at 598; *Georgia Power*, 830 F.2d at 165-66; *Uncompahgre Valley Water Users*, 785 F.2d at 275; *Board of Electric Light*, 725 F.2d at 178; *Ventura County*, 601 F.2d at 1085; *Mega Renewables*, 644 F. Supp. at 499; *Town of Springfield v. McCarren*, 549 F. Supp. at 1154-57.

Thus, *First Iowa* remains valid and controlling law. Not only do courts continue to rely on this case, there are many projects which have been built or are planned, all of which have proceeded on the basis that they are subject to only one licensing authority.[5]

In its publication Water Power — Use Of A Renewable Resource (May 1988), the Commission estimated that the some 2,030 hydroelectric power plants operating in the United States as of January 1, 1988 had a total capacity of over 88,000,000 kilowatts. More than half of this capacity was developed by non-federal entities, and is regulated by FERC, pursuant to some 1,000 licenses issued under the FPA. Projects owned and operated by publicly-owned entities, such as the members of APPA, account for over 16,000,000 kilowatts of capacity.

[5] California raises the specter of different projects on the same river being subject to different regulations. Pet. Cert. 22. It does not, however, state how frequently this event occurs. Furthermore, the hypothetical fails to address the fundamental differences between hydroelectric projects and other types of river projects. Most importantly, the example implicitly assumes that FERC would not take into account all river uses when setting license conditions, as it must under a number of federal statutes including the National Environmental Policy Act, 83 Stat. 852, as well as the FPA, as amended most recently in the Electric Consumers Protection Act of 1986, 100 Stat. 1243. California provides no reason to believe its assumption has any basis in reality.

Applications pending at FERC as of September 30, 1988 for 150 major hydroelectric project licenses involved more than 3,600,000 kilowatts of new capacity. Also at that time some 465 preliminary permits either outstanding or applied for involved the feasibility of installing about 12,000,000 kilowatts of additional new capacity. FERC 1988 Annual Report at 14. The cost of developing the approximately 15,600,000 kilowatts of new capacity involved is estimated to be $31 billion.

The type of investment necessary to bring these and future proposals to fruition requires certainty with respect to water flow conditions to be imposed on the projects' sponsors. Similarly, owners of existing projects, who have long relied on the finality and certainty of their FERC licenses, cannot afford to have their embedded investments and power planning decisions subjected to the changing prerogatives of various single-purpose state agencies. For every cubic second-foot of water required to be bypassed for fish or other non-power values, the volume of water available for hydroelectric generation is correspondingly reduced. Stream flows are the lifeblood of any hydroelectric project; thus, the power to prescribe minimum bypass flows is the power to destroy a project's feasibility. If California were to prevail in the case at bar, existing as well as new licensees would be hostage to the fluctuating demands of narrowly focused state agencies at any time during the terms of their licenses.

This Court provided a necessary measure of certainty over 40 years ago when it confirmed that the FPA vests the Commission with final authority over all regulatory aspects of jurisdictional hydropower development, reserving to the states only those matters that pertain to the ownership of water rights for irrigation or for municipal or other uses. The Court of Appeals below correctly followed *First Iowa* and the long line of cases that have consistently adhered to that decision. There is no reason to revisit it.

CONCLUSION

Amicus APPA requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1989, I served a true and correct copy of the foregoing Amicus Curiae Brief of the American Public Power Association, by placing a copy thereof in the United States mail, postage prepaid, addressed to the following:

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